United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1211

To be submitted

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1211

UNITED STATES OF AMERICA,
Appellee,

—v.—

IRVING BIRNBAUM,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Irving Birnbaum appeals from an order of the Honorable Milton Pollack, United States District Judge, filed November 21, 1975, denying his motion, pursuant to Rule 35 of the Federal Rules of Criminal Procedure, to reduce or modify his senence.

Statement of Facts

On May 1, 1972 Birnbaum was convicted by a jury on Count One of Indictment 71 Cr. 1169, which charged him with having conspired to traffic in narcotics in violation of Title 21, United States Code, Sections 173 and 174 (repealed in 1970) and Title 26, United States Code, Sections 4705(a) and 7237(d) (repealed in 1970). There-

after, on June 28, 1972, Birnbaum was sentenced under the applicable penalty provisions to a mandatory minimum term of five years' imprisonment, without eligibility for parole.

Birnbaum's conviction was affirmed on appeal. *United States* v. *Bynum*, 485 F.2d 490 (2d Cir. 1973), *vacated and remanded for further consideration*, 417 U.S. 903 (1974), *aff'd on reconsideration after remand to the District Court*, 513 F.2d 533 (2d Cir. 1975), *cert. denied*, 44 U.S.L.W. 3273 (U.S. Nov. 11, 1975).

On November 21, 1975, Birnbaum moved to reduce or modify his sentence, requesting an absolute reduction of his sentence to a period of incarceration of less than five years or, alternatively, immediate eligibility for parole consideration pursuant to 18 U.S.C. § 4208(a)(2). The motion was supported by an affidavit of counsel, claiming (1) that, after Birnbaum's sentencing, it became permissible to sentence narcotics violators to terms of imprisonment of less than the mandatory minimum five years and (2) that the defendant was worthy of a reduction of his sentence, because after his narcotics offense he had operated a trucking business and supported his ailing mother. This motion was denied by endorsement decision on November 21, 1975.

ARGUMENT

The District Court did not err in failing to reduce or modify Birnbaum's sentence.

Birnbaum argues, first, that the District Court was possessed of power to both reduce his sentence or modify it to permit immediate parole consideration under 18 U.S.C. § 4208(a)(2) and, second, that he advanced

such compelling reasons to support his motion that it should have been granted. These arguments are frivolous.

The short answer to Birnbaum's contentions is that the District Court was entirely without power to grant the relief requested. While amendments to the narcotics laws enacted in 1970 did away with provisions prescribing mandatory minimum sentences, those provisions remained in effect, pursuant to a savings clause, for all those defendants, such as Birnbaum, who committed their offenses prior to the effective date of the amendment. See *Warden* v. *Marrero*, 417 U.S. 653 (1974); *Bradley* v. *United States*, 410 U.S. 605 (1973); *United States* v. *Kella*, 490 F.2d 1095 (2d Cir. 1974); *United States* v. *Fiotto*, 454 F.2d 252 (2d Cir. 1972). Thus, the five-year mandatory minimum sentence received by Birnbaum could not be reduced without violating congressional enactments.

Equally unavailing is Birnbaum's request for immediate parole consideration under 18 U.S.C. § 4208(a)(2). While Congress has recently enacted a 1974 amendment to the narcotics laws which allows narcotics offenders, such as Birnbaum, who were convicted under no-parole penalty provisions, to receive parole consideration under 18 U.S.C. § 4202 after having served one-third of their sentences, this amendment does not allow for immediate parole consideration pursuant to 18 U.S.C. § 4208(a)(2). Pub. L. 93-481, 88 Stat. 1455 (1974).* Accordingly, the

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* The 1974 amendment provides, in relevant part, that:
"Section 702 of the Controlled Substance Act is amended by adding at the end thereof the following new subsection:
"(d) Notwithstanding subsection (a) of this section or section 1103, section 4202 of title 18, United States Code, shall apply to any individual convicted under any of the laws repealed by this title or title III without regard to the terms of any sentence imposed on such individual under such law" (footnote omitted).

District Judge did not have the power to modify Birnbaum's sentence, as requested to permit immediate parole consideration under § 4208(a)(2).

But even assuming arguendo that the District Judge was possessed of the power to reduce or modify Birnbaum's sentence, he could not be said to have abused his discretion in denying the relief requested. In *United States* v. *Slutsky*, 514 F.2d 1222, 1226 (2d Cir. 1975), this Court summarized the principles applicable to appeals from Rule 35 motions:

> "A motion for reduction of sentence is essentially a plea for leniency and also affords the judge an opportunity to reconsider the sentence in light of any new information about the defendant or the case . . ." *United States* v. *Ellenbogen*, 390 F.2d 537, 543 (2d Cir.), *cert. denied*, 393 U.S. 918, 89 S. Ct. 241, 21 L. Ed. 2d 206 (1968). Ordinarily the disposition of the motion is within the sound discretion of the district judge, and the scope of appellate review is quite narrow. *United States* v. *Stumpf*, 476 F.2d 945 (4th Cir. 1973); *United States* v. *Jones*, 444 F.2d 89 (2d Cir. 1971)." See also *United States* v. *Bickoff*, 531 F.2d 182 (3rd Cir. 1976); *United States* v. *Cardi*, 519 F.2d 309 (7th Cir. 1975); *United States* v. *H. B. Gregory Co.*, 502 F.2d 700 (7th Cir. 1974), *cert. denied*, 422 U.S. 1007 (1975).

In the face of these principles it cannot be said that the District Court erred in denying Birnbaum's "plea for leniency." Birnbaum was convicted for his involvement in a large narcotics conspiracy involving "one successful robbery, together with the near fatal shooting of the victim, another aborted robbery and an elaborate plan to murder a corrupt New York City patrolman, who was

thought to be cooperating with the authorities." 485 F.2d 490, 493. The proof at trial showed Birnbaum to be a middleman and seller of multi-kilogram quantities of heroin for large amounts of money. *Id.* at 497. In light of these facts, Birnbaum's sentence, which, together with two others, was the shortest received by the thirteen co-conspirators, 475 F.2d 832, 834 n.1, demonstrated the exercise of more than a slight degree of leniency by the District Judge. The claim that the District Judge abused his discretion in not further reducing Birnbaum's sentence for this serious offense, resting on his counsel's affidavit submitted to show that Birnbaum operated a trucking business and supported his ailing mother between the time of arrest and his sentence, is utterly frivolous.

CONCLUSION

The order of the District Court should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Steven A Levy being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 24th day of June, 1976, he served a copy of the within brief by placing the same in a properly postpaid franked envelope addressed:

Atty Morrow D. Mushkin
600 Old Country Road
Garden City, N.Y 11530

And deponent further says that he sealed the said envelope and placed the same in the mail box for mailing at One St. Andrew's Plaza, Borough of Manhattan, City of New York.

Steven A Levy

Sworn to before me this
24th day of June, 1976

Mary I. Avent

MARY I. AVENT
Notary Public, State of New York
No. 03-4609237
Qualified in Bronx County
Cert. filed in Bronx County
Commission Expires March 30, 1977